1000 at&t

Robert W. Quinn, Jr.
Senior Vice President

Washington, D.C. 20036

AT&T Services, Inc.
1120 20th St. NW, Suite
Federal Regulatory

Phone 202 457-3851
Fax 832 213-0243

August 28, 2007

EX PARTE VIA ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Petitions of AT&T Inc. and BellSouth Corporation Under 47 U.S.C. § 160(c) for Forbearance from Title II and Computer Inquiry Rules with Respect to Broadband Services*, WC Docket No. 06-125

Dear Ms. Dortch:

The forbearance relief requested in the above-referenced petitions should be granted on a uniform national basis.[1] As AT&T previously explained, the broadband services at issue here are subject to robust, national competition from a wide variety of intramodal and intermodal competitors.[2] This Commission, moreover, has adopted a national framework for evaluating broadband competition and has consistently applied that national framework in every broadband order it has issued over the past five years – an approach that has been approved by both the D.C. Circuit and the Supreme Court. As discussed below, any departure from this judicially sanctioned national framework for broadband services in the context of AT&T's pending broadband forbearance petition would be both legally suspect and analytically unwarranted.[3]

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[1] AT&T Inc. ("AT&T") filed a petition for forbearance in this proceeding on July 13, 2006; BellSouth Corporation filed a similar petition for forbearance on July 20, 2006. Subsequently, AT&T Inc. and BellSouth Corporation merged. This letter supports both AT&T Inc.'s and BellSouth Corporation's petitions.

[2] *See* AT&T Petition at 5, 15; BellSouth Petition at 11-12. *See also* AT&T Reply Comments at 19-31. In this letter, for the sake of convenience, AT&T occasionally refers to the services at issue as "broadband enterprise services." AT&T emphasizes, however, that it is seeking relief for all of the services specified in the above-captioned forbearance petitions regardless of the type of customer seeking to use them. *See* AT&T Reply Comments at 4-5.

[3] On August 23, 2007, AT&T received a letter from the Wireline Competition Bureau stating that, "[i]n light of the issue raised by the Commission's recent ACS Order

I. The Commission Has Consistently Employed a National Analysis to Judge the Competitive State of the Broadband Industry, Including Broadband Enterprise Services

For the last five years, the Commission has worked to create a uniform national framework for the regulation of broadband services. During those five years, the Commission has released a series of orders, in both the rulemaking and forbearance context, that have moved the Commission toward that goal, and in the process it has unleashed a torrent of investment in next generation broadband facilities. In every single one of those orders, the Commission has looked to national market conditions in assessing competition in the broadband industry. Basic principles of administrative law, as well as sound policy, require that it do the same here.

In the 2002 *Cable Modem Declaratory Ruling*, the Commission announced a core policy objective of creating a "rational framework for the regulation of competing [broadband services]."[4] The first step in establishing that framework was to address "the appropriate *national* framework for the regulation of cable modem service."[5] In analyzing the competitive state of the broadband industry for

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concerning the proper geographic scope of analysis for the enterprise broadband market, we ask that you provide the Commission . . . market data to enable a 'local market analysis' for the services identified" in the forbearance petitions pending in this proceeding. Letter from Thomas J. Navin, Chief, Wireline Competition Bureau, to Robert W. Quinn Jr., Senior Vice President – Federal Regulatory AT&T Inc., *et al.*, at 1 (Aug. 23, 2007). The Bureau's reference to a "local market analysis" is apparently taken from Commissioner McDowell's separate statement on the *ACS Forbearance Order*. *See* Memorandum Opinion and Order, *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended (47 U.S.C. § 160(c)), for Forbearance from Certain Dominant Carrier Regulation of Its Interstate Access Services, and for Forbearance from Title II Regulation of its Broadband Services, in the Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area*, FCC 07-149 (FCC rel. Aug. 20, 2007) ("*ACS Forbearance Order*"). In his statement, Commissioner McDowell stated that he "believe[d] that a local market analysis, rather than a national market analysis, is the correct basis for determining whether [the forbearance] relief is warranted." In the event this reference to a "local market analysis" may be construed to apply beyond the "unique" conditions found in Anchorage Alaska, AT&T respectfully files this ex parte.

[4] Declaratory Ruling and Notice of Proposed Rulemaking, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798, ¶ 6(2002) ("*Cable Modem Declaratory Ruling*").

[5] *Id.* ¶ 56.

that purpose, the Commission relied upon national, not local, broadband data.[6] In *National Cable & Telecommunications Association v. Brand X Internet Services*, the Supreme Court upheld the Commission's classification of cable modem service, and it specifically affirmed the Commission's consideration of national "market conditions."[7]

Following on the heels of the *Cable Modem Declaratory Ruling*, the Commission took further steps to reduce broadband regulation in the *Triennial Review Order*.[8] In that order, the Commission concluded – here again, on a uniform, national basis – that incumbent local exchange carriers need not unbundle network elements used to provide broadband service. The Commission applied that landmark decision irrespective of the type of customer (*i.e.*, mass market, small- or medium-business, or large enterprise) served by those broadband elements.[9] The Commission did *not* analyze local market conditions in affording that national relief. Indeed, the Commission reiterated this point just last week in the *ACS Forbearance Order* when it observed that the broadband regulatory relief provided by the *Triennial Review Order* was "on a national basis."[10] The Commission's decision not to require unbundling of these elements on a nationwide basis was subsequently upheld by the D.C. Circuit.[11]

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[6] *See*, *e.g.*, *id.* ¶ 1 (citing national statistics on cable modem service); *id.* ¶ 9 (citing national data on the competitive state of the broadband industry); *see also* ¶ 6 (finding that Internet access services are "evolving over multiple electronic platforms").

[7] *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 1001 (2005). The Supreme Court also cited the D.C. Circuit's decision in *United States Telecommunications Association v. FCC*, 290 F.3d 415, 428 (D.C. Cir. 2002), in which the court of appeals cited the Commissions findings of "robust competition . . . in the broadband market." *See* 545 U.S. at 1001.

[8] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*").

[9] *See id.* ¶¶ 210, 241-246, 255-263, 272-280, 285-295.

[10] *ACS Forbearance Order* ¶ 15. The Commission made a similar observation in a previous forbearance order. *See* Memorandum Opinion and Order, *In the Matters of Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c), SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c), Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c), BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)*, 19 FCC Rcd 21496, ¶ 23 (2004) ("*271 Broadband Forbearance Order*") (noting that "the D.C. Circuit upheld the Commission's findings in the *Triennial Review Order* that it was appropriate to relieve the BOCs from unbundling obligations on a *national basis* for the broadband elements at issue") (emphasis added).

[11] *United States Telecom. Ass'n v. FCC*, 359 F.3d 554, 578-85 (D.C. Cir. 2004).

The Commission then applied this same national approach in the *271 Broadband Forbearance Order*. There, the Commission granted "all BOCs forbearance from section 271's access obligations" with respect to "broadband elements," and it did so "on a national basis."[12] In reaching that conclusion, the Commission "refuse[d] to take the static view [of the broadband marketplace] suggested by some competitors,"[13] because "the broadband market is still an emerging and changing market."[14] Importantly, the Commission relied upon *national data* showing competition not only with respect to "residential and small-business broadband customers," but also with respect to "large business customers."[15] In addition, the Commission emphasized that both "actual and *potential*" competition would drive providers' decisions to deploy next-generation services and compete in the broadband marketplace.[16]

On appeal, the D.C. Circuit upheld the Commission's analysis in the *271 Broadband Forbearance Order*, including, in response to a direct challenge, its national approach to analyzing market conditions. In challenging the Commission's order, EarthLink argued that the forbearance statute required the Commission to conduct a "painstaking analysis of market conditions," taking into account "particular geographic markets" and "specific telecommunications services."[17] The Commission, on the other hand, urged the D.C. Circuit to reject that view, explaining that it was appropriate to "evaluate[] the broadband marketplace . . . *on a nationwide basis* to determine whether the statutory criteria for forbearance were satisfied."[18] Describing EarthLink's argument as "tenuous, at best," the court flatly rejected the claim that the Commission was obligated to conduct a "localized" analysis of "specific services."[19] Instead, the court agreed with the Commission, holding that the statute "imposes no particular mode of market analysis or level of geographic rigor" and endorsing the Commission's view that, because "the broadband market [is] still emerging and developing," the Commission properly

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[12] *271 Broadband Forbearance Order* ¶ 12.

[13] *Id.* ¶ 29.

[14] *Id.* ¶ 22.

[15] *Id.*

[16] *Id.* (emphasis added).

[17] *EarthLink, Inc. v. FCC*, 462 F.3d 1, 8 (D.C. Cir. 2006) (internal quotation marks omitted).

[18] Brief for Respondents at 21-22, *EarthLink, Inc. v. FCC*, No. 05-1087 (D.C. Cir. Feb. 6, 2006) (emphasis added).

[19] *EarthLink*, 462 F.3d at 8.

"eschewed a more elaborate snapshot of the current market in deciding whether to forbear" from the regulations at issue.[20]

The Commission next adhered to its national approach to broadband market analysis – and again rejected the contrary view – in the *Wireline Broadband Order*.[21] There, proponents of continued broadband regulation argued that the Commission "must consider each local market as a separate geographic market and evaluate the choices available in each."[22] The Commission rejected that claim as "fail[ing] to recognize all of the forces that influence broadband Internet access service deployment and competition."[23] Specifically, the Commission reasoned that such arguments were "premised on data that are both limited and static,"[24] and that reliance on such data was inappropriate given the "[c]ontinuous change and development [that] are likely to be the hallmark of the marketplace for broadband Internet access."[25] On appeal to the Third Circuit, the Commission justified its national approach to analyzing broadband competition in the *Wireline Broadband Order* by mirroring the position it took before the D.C. Circuit in successfully defending the *271 Forbearance Order*. The Commission argued that its decision not to "distinguish[] between specific geographic . . . markets" is appropriate because "static marketplace dominance analysis" is not helpful in "an emerging market that will likely experience rapid technological and competitive changes before it reaches maturity."[26]

In keeping with the Commission's goal of establishing a consistent national framework for broadband regulation, the Commission also recently classified broadband Internet access service provided by Broadband over Powerline and wireless providers as an information service, without engaging in narrow geographic market analysis.[27]

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[20] *Id.* at 9; *see also id.* (rejecting petitioner's claim that competitive analysis of the broadband market must focus on "specific . . . geographic markets").

[21] Report and Order and Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853 (2005).

[22] *Id.* ¶ 49.

[23] *Id.* ¶ 50.

[24] *Id.*

[25] *Id.* ¶ 56.

[26] Brief for Respondents at 50-58, *Time Warner Telecom v. FCC*, Nos. 05-4769 *et al.* (3d Cir. oral arg. Mar. 16, 2007) (internal quotation marks omitted) ("FCC Third Circuit Brief").

[27] *See* Memorandum Opinion and Order, *United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet*

In sum, Commission precedent – affirmed by the Supreme Court and the D.C. Circuit based on the Commission's own conclusions about the proper methodology for evaluating competition among broadband services – firmly establishes that broadband marketplace conditions, including those relating to broadband enterprise services specifically, should be evaluated from a national perspective. The Commission is duty-bound to adhere to that same course here where, as discussed below, the enterprise broadband market is now even more dynamic and robustly competitive than it was when the Commission first adopted its national analytical framework for broadband.[28]

II. The Competitive Broadband Marketplace Confirms the Appropriateness of the Commission's National Approach to the Analysis of Broadband Enterprise Services

In addition to Commission precedent bearing decisively on the point, the facts on the ground demonstrate that a national approach is the only rational way to analyze the state of competition for broadband enterprise services.

First, broadband enterprise providers compete in a marketplace where "rapid technological and competitive changes" render largely irrelevant a static, backward-looking market share analysis focused on individual, narrowly defined product offerings in particular local markets.[29] As AT&T has explained in detail – and as at least one competitive carrier agrees[30] – "legacy" ATM and Frame Relay services not only compete with, but are being supplanted by, newer IP, Ethernet, and MPLS-

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Access Service as an Information Service, 21 FCC Rcd 13281 (2006); Declaratory Ruling, *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, 22 FCC Rcd 5901 (2007).

[28] *See*, *e.g.*, *Ramaprakash v. FAA*, 346 F.3d 1121, 1124-25 (D.C. Cir. 2003) ("An agency's failure to come to grips with conflicting precedent constitutes an inexcusable departure from the essential requirement of reasoned decision making.") (internal quotation marks omitted).

[29] FCC Third Circuit Brief at 50-58. *See also* Memorandum Opinion and Order, *AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, WC Docket No. 06-74, FCC 06-189, ¶ 80 (FCC rel. Mar. 26, 2007) (*AT&T-BellSouth Merger Order*) ("[W]e find that [enterprise] market shares may misstate the competitive significance of existing firms and new entrants. . . . We find that a large number of carriers compete in this market (even though the market shares of some may be small), and that these multiple competitors ensure there is sufficient competition.").

[30] Alpheus Comments at 11 (ATM and frame relay "may have less commercial importance in the future" because they are being "supplanted by IP-enabled services.").

based broadband transmission services.[31] According to a leading research firm, "[i]t is beyond cliché to note the continued decline of legacy revenues; the move to IP is apparent and accelerating. . . . [A]ll of the major service providers continue to report flat or declining wireline data revenues, announcing . . . falling volumes and price erosion abated only by improved IP revenues."[32] Indeed, the Commission itself has acknowledged these trends, observing that, as "the market has shifted" toward new technologies, Frame Relay volumes have been declining since 2002, and ATM volumes were expected to decline beginning in 2006.[33] Much of the "market has shifted," moreover, to Ethernet-based services that boast "expanded bandwidth, flexibility, and lower cost than existing legacy [Frame Relay] or ATM services," and that are increasingly being provided by competitive carriers (such as Time Warner Telecom and Cogent) and by cable operators who "can now offer SLA-based services" and who "have been aggressively pursuing business class Ethernet opportunities."[34] In view of these trends, the fact that, in a particular location at a particular point in time, a given carrier may have a significant share of, for example, Frame Relay has little bearing on the extent of alternative enterprise broadband services such as Ethernet or IP VPN services that are available from a host of competing broadband providers.

Second, broadband enterprise services – in particular, Ethernet-based and other newer, more robust, and more flexible services – are, in fact, provided today by a range of both national and regional competitors. As documented in the Attachment to this letter, more than a half dozen national carriers provide broadband services to enterprise customers, and another dozen or more regional and super-regional carriers serve large, often overlapping swaths of the country.[35] Additionally, every major cable provider in the country now competes aggressively

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[31] AT&T Petition at 13-15; AT&T Reply at 21.

[32] In-Stat, Share of Wallet: Telecom Trends and Expenditures in the U.S. Business Market, at 8 (Dec. 2005); *see also* IDC Market Analysis, U.S. ATM Services 2005-2009 Forecast, at 2 (May 2005) ("ATM, frame, and private line services are all under pressure from IP VPNs and transparent LAN (Ethernet) services.").

[33] *See AT&T-BellSouth Merger Order* ¶ 65 n.183; *see also* Memorandum Opinion and Order, *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, WC Docket No. 05-65, FCC 05-183, ¶ 59 n.169 (FCC rel. Nov. 17, 2005) (emphasizing these same trends).

[34] Sean Buckley, *Retail Ethernet Bonanza*, Telecommunications Online, http://www.telecommagazine.com/article.asp?HH_ID=AR_3371 (Aug. 20, 2007).

[35] The Attachment provides a representative sample of competing providers; it is not intended as an exhaustive list of all actual and potential competitors.

for customers in the business market.[36] In fact, according to a recent analyst report, no provider of business Ethernet services had more than 20 percent market share as of mid-2007, and the leading cable provider (Cox) together with the leading CLEC (Time Warner Telecom) have a *larger* combined share of the Ethernet market than the post-merger combined share of AT&T and BellSouth, which declined significantly during the first half of 2007.[37] In addition, "systems integrators, and equipment vendors and value-added resellers" impose additional competitive pressure in the marketplace by selling the routers and other equipment and services necessary to permit large customers to create their own enterprise broadband solutions.[38] Enterprise customers, in short, can choose from a wealth of broadband providers across the country. Here again, the fact that one particular provider may, in some cases, have a significant share of one particular service, in one particular geographic location, at one particular point in time would do nothing to call into question the robust competition that characterizes the dynamic and emerging broadband enterprise services marketplace nationally. For this reason as well, the Commission should adhere to its analytically sound practice of evaluating broadband competition on a national level.

III. COMPTEL's Procedural Complaints Are Without Merit

In a recent filing, COMPTEL asserted that the Commission may not, consistent with the Administrative Procedure Act ("APA"), rely upon any data that AT&T submits in response to the Bureau's August 23 request, and it advocated that

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[36] *See*, *e.g.*, *Cable sets its sights on business services*, Reuters (Aug. 25, 2006) ("After winning over many consumers by packaging phone, Internet and TV services into attractive bundles, cable is planning to attack the estimated $100 billion corporate market next by deeply undercutting prices offered by phone rivals.").

[37] Vertical Systems Group, *Mid-Year 2007 Market Share Results for U.S. Business Ethernet Services*, Press Release (Aug. 2007) (AT&T's mid-2007 Ethernet share of 19.5% declined 2.6% from its combined year-end 2006 share, while the combined share of Time Warner Telecom (13.7%) and Cox (8.9%) grew to 22.6% as of mid-2007). *See also id.* (in addition to AT&T, Verizon, Time Warner Telecom, Cox, Cogent, Qwest, and Yipes, a plethora of other providers offer business Ethernet services around the country today, including AboveNet, American Fiber Systems, Alpheus Communications, American Telesis, Arialink, Balticore, Bright House Networks, Charter Business, CIFNet, Cincinnati Bell, Comcast Business, CT Communications, Electric Lightwave, Embarq, Expedient, Exponential-e, Fibernet Telecom Group, FiberTower, Global Crossing, Globix, IP Networks, Level 3 (including Broadwing), LS Networks, Masergy, Met-Net, Neopolitan Networks, NTELOS, NTT/Verio, Optimum Lightpath, Orange Business, RCN, Savvis, Spirit Telecom, Sprint, SuddenLink, Surewest, Time Warner Cable, US LEC, US Signal, Veroxity, Virtela, Windstream, XO, and others).

[38] *See AT&T-BellSouth Merger Order* ¶ 80.

the Commission immediately adopt (and apply in this proceeding) a "complete-when-filed" rule akin to that used in section 271 proceedings.[39] For the reasons explained above, as a substantive matter, the local market data sought in the Bureau's request is unnecessary to grant the relief AT&T seeks in this proceeding. And, from a procedural perspective, the core complaint animating COMPTEL's letter – that it will not have adequate opportunity to comment on the issues raised in AT&T's response to the Bureau's request – is wrong.

Most importantly, COMPTEL has *already* had more than sufficient opportunity – in the more than 13 months since AT&T filed its petition – to place in the record any data supporting its claim that broadband enterprise services are not competitive. COMPTEL has declined to do so, however, which is particularly notable in view of the fact that its members include numerous carriers that compete to provide enterprise broadband services and thus presumably have data that are relevant to the Commission's inquiry. But COMPTEL's decision not to put any such evidence into the record, presumably because it is unfavorable to its position,[40] hardly means it has had insufficient opportunity to do so. Beyond that, COMPTEL is wrong to suggest that it will have insufficient opportunity to review and respond to any data that AT&T submits. As COMPTEL itself notes, a decision on AT&T's petition is not due until October 11, 2007, which gives COMPTEL ample time to review AT&T's submission and to respond with any relevant information of its own.

COMPTEL is also wrong to suggest that, because AT&T's forbearance petition did not include the local market data the Bureau recently requested, that petition failed to make a "prima facie" case for relief.[41] As explained above, the Commission has long held, in both the forbearance context and elsewhere, that national market data should be used to gauge the level of competition for broadband services, including the enterprise broadband services that are at issue in AT&T's petition. As also explained above, that approach is more sound today than ever, as the enterprise broadband services marketplace continues to demonstrate the rapid growth and dynamic technological evolution that renders static market share analysis beside the point. Consistent with Commission precedent, AT&T's petition

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[39] *See* Ex Parte Letter from Mary Albert, COMPTEL, to Hon. Kevin Martin, et al., WC Docket Nos. 06-125, 06-147 (Aug. 27, 2007) ("COMPTEL Letter"). COMPTEL apparently fails to recognize the extreme irony in complaining about an alleged APA violation related to the Bureau's data request at the same time it urges the Commission to commit an APA violation by adopting a new procedural rule in the midst of the instant proceeding.

[40] *See*, *e.g.*, *United States v. Johnson*, 288 F.2d 40, 45 (5th Cir. 1961) ("The failure of a part[y] to produce relevant and important evidence within its peculiar control raises the presumption that if produced the evidence would be unfavorable to its cause.").

[41] *See* COMPTEL Letter at 2-3.

included ample evidence demonstrating that, from a national perspective, broadband enterprise services are robustly competitive and thus was fully sufficient to establish AT&T's right to relief.[42]

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In accordance with Section 1.1206 of the Commission's rules, an electronic copy of this letter and its attachment is being submitted via the Commission's Electronic Comment Filing System.

Sincerely,

/s/
Robert W. Quinn, Jr.

Cc: Ian Dillner
Scott Deutchman
Scott Bergman
Chris Moore
John Hunter
Tom Navin

[42] Indeed, AT&T's petition was sufficient even under the "complete-when-filed" approach that COMPTEL wrongly contends is applicable here. *See* Updated Filing Requirements for Bell Operating Company Applications Under Section 271 of the Communications Act, DA 01-734, at 3 (Mar. 23, 2001) ("The Commission expects that a section 271 application, as originally filed, will include all of the factual evidence *on which the applicant would have the Commission rely in making its findings*") (emphasis added) ("271 Filing Requirements"). Furthermore, the information AT&T submits in response to the Bureau's request is responsive to claims COMPTEL itself made in its reply comments, and it would therefore properly be considered even under a "complete-when-filed" rule. *See* CompTel Reply Comments at 2 (asserting that the Commission cannot grant forbearance "absent evidence that the ILECs face sufficient facilities-based broadband competition in their serving areas to ensure that the interests of consumers and the goals of the Act are met," and alleging that AT&T failed to provide such evidence); *see also* 271 Filing Requirements at 3 (noting that the applicant "may submit new evidence after filing" in order "to rebut arguments made or facts submitted by other commenters").